2006

Barbara B. Uzelac v. Joseph G. Uzelac, Jr. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In the Matter of the Estate of LOUIS J. UZELAC Deceased. --- BARBARA B. UZELAC, Appellant, v. JOSEPH G. UZELAC, JR., as Personal Representative of the Estate of Louis J. Uzelac, --- SUSAN BROOKE MAGERAS and ALLYSON D. UZELAC, Intervenors and Cross Appellants.	Appellate Case No. 20060858-CA Trial Court Case No. 993901690 Judge Leon A. Dever

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ARGUMENT

This appeal boils down to two questions: (1) is the homestead presently available to the Estate for liquidation and payment of Barbara's devise; and (2) was Barbara's devise calculated properly by the trial court on remand. If this Court affirms the trial court's determination[1] that Barbara is time barred from seeking to recover the homestead back into the Estate, this Court need not reach the second question.

A. UNDER ANY THEORY, THE HOMESTEAD CANNOT BE RECOVERED BACK INTO THE ESTATE.

1. The "Proceeding" Question.

When this case was remanded after *Uzelac I*[2] Barbara immediately asked the trial court to order Brooke and Allyson to re-deed the homestead back into the Estate. R.1495, 1497 The homestead had been transferred out of the Estate by deed on May 29, 2003. Ex.21 Brooke and Allyson responded by intervening (R. 1529) and asserting Section 1004, which governs the "Liability of distributees to claimants." Utah Code Ann. § 75-3-1004; R. 1583 Section 1004 states that "an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees." (Emphasis added)

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[1] R.1754-1755

[2] In this brief, the Court of Appeals' first decision, *In re Estate of Uzelac*, 2005 UT App 234, (R.1472) will be referenced as "*Uzelac I*."

Barbara never prosecuted any action against Brooke and Allyson. All she ever did was file the 2003 Motion. R.912 Since the statute of limitations for bringing Section 1004 proceedings had run, Barbara began to argue that the 2003 Motion[3] was a "proceeding." R.1636-1638 The trial court rejected this argument:

> It is clear that no proceedings against either of the distributees of the real property requested to be recovered has been instituted. The claim of Mrs. Uzelac that her claim as a creditor of the Estate was sufficient to put the daughters on notice is not well taken. The statute is clear that the action must be against the distributees, not the estate.

R. 1755, ¶ 6 Additionally, it should be noted that Barbara's 2003 Motion does not mention or cite Section 1004 in any way. R.918

On appeal, Brooke and Allyson demonstrate that if the 2003 Motion was a "proceeding" (though it was not "against Brooke and Allyson") then it was also a final appealable order under the longstanding authority of *In re Estate of Vorhees*, 336 P.2d 977 (Utah 1961); *In re Estate of Bacon*, 556 P.2d 1271 (Utah 1976); *In re Estate of Christensen v. Christensen*, 655 P.2d 646 (Utah 1982) and *In re Estate of Morrison*, 933 P.2d 1015 (Utah Ct. App.

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[3] The 2003 Motion was captioned as a "Motion" in this consolidated action of the Formal Probate (Case No. 993901690) and Barbara's Complaint against the Estate (Case No. 020901576). R.912

1997). "Formal proceedings" are "proceedings conducted before a judge with notice to interested persons." Utah Code Ann. § 75-1-201(18). Indeed, Brooke and Allyson received notice of the 2003 Motion (R.914) and filed a memorandum in opposition. R.959 Judge Dever denied the motion and made findings. R.1080 This ruling was "final as to all persons with respect to all issues concerning the decedent's estate that the court considered . . ." Utah Code Ann. § 75-3-412. The ruling was "[s]ubject to appeal and . . . vacation" and modification. *Id.* Barbara employed none of these procedures. She proceeded to trial on her Complaint against the Estate and ultimately appealed after that trial. R.1366

From the Reply Brief, it is clear that in 2003, Barbara's counsel was aware of the *Vorhees, Bacon, Christensen* and *Morrison* final judgment rule but chose not to appeal. *See* Reply Brief, p. 20, fn 13 ("Barbara's counsel faced this argument on another case . . ."). There was no appeal in 2003 because no one, especially Barbara, thought the 2003 Motion in the Estate lawsuit was a qualifying "proceeding."

2. Part 4 of Title 3 is the Applicable Statutory Scheme.

Attempting to avoid the law of *Vorhees, Bacon, Christensen* and *Morrison,* Barbara next argues that her 2003 Motion was not a "Part 4 proceeding." *See* Reply Brief of Appellant, pp. 17-18. Barbara conspicuously does not distinguish *Vorhees, Bacon,*

Christensen or *Morrison*; indeed she cannot without reassuming her limitation problems under Sections 1004 and 1006. Barbara instead reasons that if she is not under Part 4, the unsuccessful 2003 Motion to return the homestead to the Estate was not final and appealable in 2003 and not *res judicata* now.

When this action was filed in 1999, an Order of Formal Probate of Will and Formal Appointment of Personal Representative was entered. R.13 Formal testacy and appointment proceedings are governed by Part 4, Title 3 of the probate code. By contrast, informal testacy proceedings are governed by Part 3 and supervised administration by Part 5. Clearly, this action is governed by Part 4.

In *Christensen,* the Utah Supreme Court noted "[a]n order admitting a will to probate in the course of a formal testacy proceeding is a final order for purposes of appeal [citing Utah Code Ann. § 75-3-412]. The order dismissing an omitted spouse's petition is similar in that it resolves an issue of vital importance and concludes a major phase in the process of formal testacy proceedings . . . The order is therefore final for purposes of appeal." *Christensen,* 655 p.2d 646, 648 (Utah 1982)(emphasis added).

It is hard to imagine an issue more central to this case than the disposition of the homestead property. It has been at issue from the early months of this probate action. *See, e.g.*

R.792 (Letter dated May 23, 2000) *Morrison's* "pragmatic test" throws its weight toward a final order conclusion here. Barbara's life estate encumbers the property. After distribution and in reliance on the adjudication, Brooke and Allyson purchased the water shares to the homestead. Exs. 16, 17 No Section 1004 or 1006 proceeding was ever filed or served. In *Vorhees*, the "order compelling a decedent's widow to transfer land to the estate was final although the trial court retained jurisdiction over the other estate matters." *Morrison*, 933 P.2d at 1017. "The court premised its holding on the fact that the order decided 'the real issue' in the case and 'did not leave open for reconsideration the question as to who owned that property.'" *Id.* The situation here is identical.

3. If the 2003 Motion was a Proceeding, There is No Subject Matter Jurisdiction to Alter the Order.

Barbara points out that, in the course and scope of her first appeal, *Uzelac I* summarily vacated the September 27, 2003 order. However, it is well established that "questions regarding subject matter jurisdiction may be raised at any time because such issues determine whether a court has authority to address the merits of a particular case." *Ameritemps, Inc. v. Labor Commission*, 128 P.3d 31, 2005 UT App 491.

At the time of the first appeal, Barbara was not relying on the 2003 Motion to save herself from a limitations problem.

Prior to remand, Barbara never argued or viewed the 2003 Motion as a separate "proceeding." She did not appeal it within 30 days and viewed it as a motion preliminary to her trial. She was still claiming to be a creditor of the Estate. R.1080 The 2003 Motion was brought in the case against the Estate and not "against" Brooke and Allyson.

When, in the context of remand, Barbara realized she never filed any "proceeding against the distributees," she first characterized her 2003 Motion as a "proceeding" under the probate code. R.1637 Brooke and Allyson simply argue that if the 2003 Motion qualifies as a "proceeding" that Barbara also must accept the law that comes with "proceedings:" they are final and appealable not at the end of the case, but 30 days from issuance. *Christensen*, 655 P.2d at 648; *Morrison*, 933 P.2d at 1017 and *Vorhees*, 336 P.2d at 980. Appealable orders not appealed within 30 days are *res judicata*. *In re Estate of Kirk,* 278 N.E. 2d 503 (Ill. Ct. App. 1971). If this court agrees with Barbara that the 2003 Motion qualifies as a "proceeding," no subject matter jurisdiction exists, now or at the time of *Uzelac I*, for modification of that final appealable order.

However, Brooke and Allyson continue to assert that the trial court was correct in finding that no "proceeding against either of the distributees" had been filed in 2006 and that the statute of limitations for doing so had run. Utah Code Ann.

§ 75-3-1006; R. 1755 Barbara's request on remand for the trial court to order the homestead to be re-deeded to the Estate was time-barred.

4. The Homestead is an Encumbered Asset.

In her Reply Brief, Barbara argues that the life estate was not "distributed" to her and that pre-distribution statutes apply. *See* Reply Brief of Appellant, p. 14. This is a new argument made from the perspective of one backed into a corner. In point of fact, Barbara has long acknowledged that the homestead was "distributed" in 2003. R.921 and 1636

The trial court ruled in 2001 that Barbara's interest was not a license but a life estate determinable. R.136, 138 At no time has Barbara appealed that ruling. *See Uzelac I* and Brief of Appellant. The Estate then deeded the homestead to Brooke and Allyson "subject to a life estate determinable in Barbara Uzelac" in 2003. Ex.21 Since 2003 post-distribution rights, liabilities and obligations have applied to Barbara. Utah Code Ann. § 75-3-1004. Since 2003, Barbara has had a present possessory interest in the homestead.

Therefore, Brooke and Allyson's "Bob Jones" hypothetical rings true. *See* Brief of Intervenors/Cross-Appellants, p. 19 Barbara's attempts to distinguish it are phrased in the pre-distribution period of time when other provisions of the probate code are still applicable. When Barbara poses a post-

distribution hypothetical, she has to recognize the applicability of Section 1004 proceedings. *See* Reply Brief of Appellant, p. 17. Those proceedings must be "against distributees."

The fact remains that, in 2007, Barbara still has her life estate determinable in the homestead property. In the years since Louis' death, Barbara has neither moved from the property nor remarried. Both in the trial court below and on appeal, Barbara has not provided the Court with any citation, precedent or authority to justify the court-ordered liquidation of distributed property in which a life tenant has a present possessory interest. If Barbara *chose* to move or remarry, the homestead would vest in Brooke and Allyson in fee simple. There is no basis for a court to *order* Barbara to move, be paid the value of the life estate for the rest of her life (an unknown period of time) and receive her devise plus prejudgment interest.

Louis' Will provided that Barbara was "to receive per the terms of our antenuptial agreement." Ex.4 That document gave Barbara "all property real personal or mixed acquired by the parties during the marriage," sought to separate and protect premarital property from claims upon death and divorce and gave Barbara her life estate determinable. Ex. 1 To allow Barbara to receive other than "per the terms" of that antenuptial

agreement would be contrary to Louis' intent. Louis intended Barbara have the life estate. Barbara agreed to quit claim her interest in all premarital real property (Ex. 1, p. 2, ¶ 1) "in the event of termination of [the] marriage by death . . ." *Id.*

B. THE CLAIM FOR PREJUDGMENT INTEREST

1. Classification of Devises

The argument concerning the classification of devises is central to Barbara's claim for prejudgment interest on her devise. Barbara incorrectly states in her Reply Brief that Brooke and Allyson "claim for the first time on appeal that Barbara's devise is a general devise chargeable to specific property." Reply Brief of Appellant, p.3 There is no question these issues were properly raised and preserved below. This position was argued on remand with Barbara's counsel in attendance. However, the remand transcript was not initially made a part of the record on appeal. R.1780

Utah R. App. P. 24(h) states that "If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth . . . [t]he appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted." *See* Motion to Augment the Record

and to Strike Exhibit A to Appellant's Reply Brief dated April 23, 2007. This Court can and should recognize the 1/30/06 transcript and make it a part of the record.

Barbara's devise granted her "all property, real, personal or mixed acquired by the parties during the marriage." Ex. 1, ¶ 5 This is not a "general pecuniary devise" on which interest is statutorily assessed. Utah Code Ann. § 75-3-904. It was a devise chargeable to premarital property. As it turned out at the time of Louis' death, there was no real property and there was no mixed property. The personal property "acquired during the marriage" consisted only of cash. R.1751, ¶ 4 On remand the trial court took the value in Louis' personal accounts at the time of the marriage and subtracted that from the value in all of Louis' accounts at his death. This ultimately resulted in a monetary figure ($230,660). R.1757 The devise itself, however, was not for $230,660[4]. It was for "all property, real personal or mixed acquired by the parties during the marriage" and "held at death." *Uzelac I* at fn 2; 2005 UT App 234.

2. The Creditor Argument

Again in the Reply Brief of Appellant, Barbara's creditor argument reappears in support of the prejudgment interest claim. *See* Reply Brief of Appellant, pp. 9-10. This issue was

[4] In fact, the value of the POD accounts should not have been included in the calculation as argued below.

raised repeatedly at trial (Tr.60) barred by the Court of Appeals first decision (R.1486[5]) and rejected on remand. R.1750-1751 Yet again, Barbara argues "Louis is presumed to know that Barbara was entitled to be a creditor of the estate who would receive payment prior to any other beneficiary." Reply Brief of Appellant, p. 9. Barbara argues that since Louis knew she would be a creditor, her devise must be a general pecuniary devise (entitling her to interest). *Id.* Louis did not "know Barbara would be a creditor;" he spelled out her entitlements clearly.

Barbara's devise[6] is specifically "all property, whether real, personal or mixed acquired by the parties." Ex.1, p. 2, ¶ 5 Louis provided that Barbara "shall receive per the terms of the AnteNuptial Agreement" (Ex.4, p.1); other terms of that same AnteNuptial Agreement include:

- The parties both had children and separate property prior to the marriage (Ex.1, p.1)
- Barbara's interest in the homestead is defined as a life estate determinable; nothing more (Ex.1, p.2, ¶ 3)

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[5] Uzelac I, ¶¶ 11-14.

[6] Curiously, in the court below, Barbara characterized her entitlements under the antenuptial agreement and will as "damages." R.1640 Damages are awarded, not devised. Damages are not consistent with the concept of a "general pecuniary devise" on which interest is statutorily assessed.

- The nature of premarital property is not changed by selling, converting or exchanging it (Ex.1, p. 3, ¶ 9)

Brooke and Allyson do not attempt to "insert words" into the documents; rather they articulate the obvious and plain meaning of them.

3. "Prejudice" against Barbara

The purpose of pages 27-28 and footnote 18 (the alleged "personal attacks") in Brooke and Allyson's opening brief was to demonstrate why Barbara's devise was not capable of quantification in 2000 ("one year after the first appointment of a personal representative"). Barbara made quite a number of unsuccessful claims, which if successful would have been monetary in nature, in her Complaint against the personal representative. Certain pleadings in the record below are particularly illustrative of this. *See* R.61, R.208, R.693, R.828 and R.836 Indeed, the alleged "personal attacks[7]" about

[7] In reality, no personal attacks have been made. Certainly, credibility arguments are properly made to the trial judge. Without question, however, this is an unfortunate case in which litigation has been prolific. Barbara's numerous unsuccessful claims and tactics in the case explain how the parties find themselves in this appeal in 2007. The claims and tactics also explain why Barbara is not entitled to interest on her devise, the amount of which she has disputed and attempted to augment for seven years.

which counsel complains in his Reply Brief are actually contained in the record below and not on appeal.

C. THE POD ACCOUNTS SHOULD NOT HAVE BEEN INCLUDED IN THE TRIAL COURT'S EQUATION.

The only facts necessary to a determination of the POD issue are marshaled in Brooke and Allyson's opening brief at pages 11 through 13. Some of the monetary amounts the trial court included in its Judgment were in POD accounts and not "held at death." Since by definition, the POD accounts were not "held at death" they should not have been included in Judge Dever's mathematical calculation. The amount in the POD accounts, $201,839.15, should be subtracted from Barbara's devise. R.1006

Brooke and Allyson simply ask the Court to rule the POD accounts were definitionally not part of the Estate and should not have been included in the calculation and to remand the case to the trial court to recalculate the amounts and amend the Judgment. Additionally, it is not true that the POD issue is raised for the first time on appeal. R.1587; *see also* Motion to Augment the Record and to Strike Exhibit A to Appellant's Reply Brief, dated April 23, 2007 at pp. 5-6.

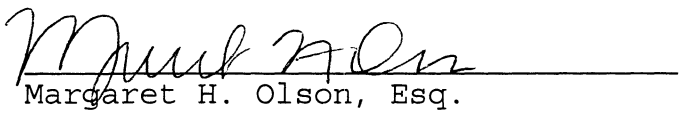
CONCLUSION

The only error in the trial court's remand Judgment was the inclusion of monies in POD accounts in the calculation of "all

property acquired during the marriage and held at Husband's death."

DATED this 23rd day of April, 2007.

HOBBS & OLSON, L.C.



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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Reply Brief of Intervenors/Cross Appellants were hand delivered to the following:

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